93-98

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1993

Mary A. Robb,

Petitioner,

v.

Electronic Data Systems,

Respondent.

On Writ of Certiorari To The United States Court of Appeals For the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED[1]

Did the circuit court err in this age discrimination case in upholding the trial court's summary judgment determination that, as a matter of law, no genuine issue of material fact existed as to the pretextuality, *vel non*, of the reasons articulated by defendant to justify plaintiff's termination?

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[1] The caption of this case in this Court contains the names of all parties in interest.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

This petition seeks review of a panel decision of the United States Court of Appeals for the Fifth Circuit, which is unreported. It is reprinted as Appendix "C." The Memorandum Opinion of the United States District Court for The Northern District of Texas, Dallas Division (Solís, Jorge A.) is reprinted as Appendix "A." The trial court's Amended Judgment is Appendix "B."

JURISDICTION

The decision of the Court of Appeals was entered on April 16, 1993. No motion for rehearing was filed. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

As applicable to this proceeding, the relevant portions of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621, *et seq.*, provide as follows:

> It shall be unlawful for an employer--
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; [or]
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or
>
> * * *

29 U.S.C. § 623(a)(1),(2).

STATEMENT OF THE CASE

This is an employment discrimination case (R.I at 1-4). Robb sued EDS, saying that EDS violated the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 621, *et seq.*, by eliminating Robb's position and terminating her employment on account of her age (R.I at 1-4). EDS denied Robb's allegations and filed its first Motion for Summary Judgment on October 9, 1991. (R. I at 68-77). On November 4, 1991, after Robb moved for, and was given, additional time to respond to the motion, the lower court denied EDS' motion, without ruling on its merits, and dismissed it without prejudice (R.I at 128). EDS moved for summary judgment again on November 22, 1991 (R.I at 133-42). Robb responded to the motion on December 16, 1991 (R.I at 192-241). On September 4, 1992, the trial court issued its Memorandum Opinion and Order (R.I at 357-77).

The trial court assumed that Robb established a prima facie case of age discrimination and addressed only the pretext issue (R.I at 367). The court found EDS was entitled to judgment as a matter of law, because Robb did not show that EDS' articulated reasons for eliminating Robb's position and terminating her were a pretext for intentional age discrimination (R.I at 357-377). The court entered judgment for EDS on September 9, 1992 (R.I at 379). Because the judgment showed the wrong entry date, the court entered an amended judgment on September 11, 1992 (R.I at 380). Robb appealed from the amended judgment, and, in an unpublished opinion, the Fifth Circuit affirmed on April 16, 1993.

Robb was born on May 9, 1935 (R.I at 5). She was over the age of forty at all times relevant to this suit (R.I at 1, 5). She was fifty-four years old when she was terminated (R.I at 1-2, 234).

EDS hired Robb on October 22, 1984, as an administrative assistant in its Financial Services Department (R.I at 225; R.IV at 33). Robb worked in that department for about three and a half years and performed well (R.I at 226; R.IV at 34). Her evaluations were always at least "solid exceeds" (R.I at 226).

On April 27, 1988, EDS transferred Robb to its Productivity Services Department and made her an assistant industrial engineer, or "IE" (R.I at 226; R.IV at 34). The Productivity Services department provided support services to EDS' customers (R.I at 174, 181, 228). The department was divided into an insurance team, a corporate team, and a finance team (R.I at 168-69, 174, 181). Each team served a segment of EDS' business (R.I at 174, 181, 228). The department studied its customers' businesses and recommended ways to improve the productivity and save money (R.I at 169, 175, 181, 228). The teams did productivity studies of their customers' businesses followed by reports and recommendations (R.I at 181). The insurance team mainly worked with the insurance and business industries (R.I at 181, 228).

Each team had one or more managers or supervisors, several industrial engineers, and one assistant IE (R.I at 181). Rosalynn Ford became the corporate team's assistant IE in 1985, and Penny Welch became the assistant IE for the finance team in 1986 (R.I at 169, 175, 227; R.IV at 76). Robb was the assistant IE for the insurance team (R.I

at 181, 226; R.IV at 34). Darrell Herbst managed the insurance team, and Diane Kitchens was Robb's supervisor (R.I at 181, 227). Both Herbst and Kitchens were younger than Robb (R.I at 239).

Robb had many duties as the insurance team's assistant IE (R.I at 226-27). Among other things, Robb assisted the IE's on various projects (R.I at 226-27). She helped generate reports, proposals, and manuals, and assisted the IE's with their research (R.I at 226-27; R.IV at 22). Ford and Welch, the other assistant IE's, also had similar duties for their teams (R.I at 227; R.IV at 28-29). Robb trained the insurance team's new employees on their personal computers and taught them how to use various computer programs (R.I at 227).

Robb did many other things also (R.I at 226-27). Her duties did not change while she was an assistant IE (R.IV at 28). Robb worked with the corporate and finance teams (R.I at 227; R.IV at 29-30). Robb helped the other assistant IE's with projects (R.IV at 29-30). She sometimes trained new employees for the other teams (R.I at 227). Robb installed software on personal computers for the corporate, finance, and insurance teams (R.I at 226). She managed and maintained the software for the three teams, monitored their software packages, and did computer "trouble-shooting" for them (R.I at 226-27). She also installed printers, created batch files and menus on the computers, and installed mice for the teams (R.I at 226). Ford and Welch were not qualified to do these things for their teams (R.I at 227).

While there, Robb observed what she believed to be EDS' preference for younger employees (R.IV at 62, 64).

Robb was the oldest employee on her team (R.I at 236-39). EDS hired mostly young employees for the insurance team (R.I at 236-39). After her transfer to the department, EDS hired five IE's for the insurance team, all younger than Robb (R.I at 227, 236-39). In 1988, EDS hired Jack Britain, age 47; Alan Cole, age 22; and Andrea Peters, age 32 (R.I at 236-39). EDS hired Joan Erlinger, age 22, and Jeff Womack, age 23, in 1989 (R.I at 236-39).

Herbst and Kitchens told Robb in July or August 1988 that she was terminated (R.I at 230; R.IV at 37). Herbst quickly changed his mind, however, and put Robb on probation instead (R.I at 230; R.IV at 38). Robb disagreed with Herbst's probation notice and refused to sign it (R.I at 230; R.IV at 38). Herbst refused to give Robb a copy of the notice (R.I at 230; R.IV at 38). Kitchens harassed Robb (R.I at 230; R.IV at 95, 97-98, 104-05, 107, 109-10, 157-58). Robb was treated differently than the other assistant IE's (R.IV at 97-98). A week later, Kitchens told Robb she would not be assigned to any more projects (R.I at 231; R.IV at 32). Kitchens refused to send Robb to work on out-of-town projects (R.I at 231; R.IV at 32). After that, Robb worked on only two projects (R.I at 231; R.IV at 154). EDS management tried to bill at least 80% of its employees' time to an EDS customer (R.I at 182). Robb's time was not fully billed, since Kitchens refused to put Robb on any other projects (R.I at 231; R.IV at 32-33).

Later, in August 1988, Robb unsuccessfully tried to transfer out of the Productivity Services Department (R.IV at 48, 128-29, 155). Herbst gave Robb permission to transfer (R.I at 229, R.IV at 155). Herbst removed Robb from the Internal Openings and Placement list without her knowledge (R.I at 231; R.IV at 23, 155). Herbst evaluated

Robb in late October 1988 (R.I at 231, R.IV at 149). Her performance rating was "solid generally meets" (R.IV at 149). Herbst removed Robb from probation that month (R.I at 231). In about February or March 1989, Robb again unsuccessfully tried to transfer from the department (R.IV at 140-41).

On August 25, 1989, Herbst told Robb that she was terminated effective October 1, 1989 (R.I at 182, 231; R.IV at 44). Herbst told Robb that her assistant IE position was being eliminated (R.I at 231; R.IV at 44). Robb thought she would become vested in EDS' retirement plan on October 22, 1989, after five years of service (R.IV at 44-45). Herbst suggested that Robb look for employment outside of EDS, because he could not place Robb on the Internal Openings and Placement List (R.I at 231; R.IV at 44, 57). The list cannot be accessed by EDS employees (R.I at 231, R.IV at 76). A manager must access the Internal Openings and Placement List for an employee (R.I at 231; R.IV at 76). On September 5, 1989, Herbst chose two positions for Robb from the Internal Openings and Placement List (R.I at 231; R.IV at 155). He allowed her to look at the list quickly (R.I at 231-232; R.IV at 78, 155-56). Robb contacted one of the managers about a position (R.I at 232; R.IV at 80-81). Robb did not get the position, because the manager thought she was not qualified for the job (R.I at 232; R.IV at 80-81, 156).

On September 13, 1989, Robb filed a Charge of Discrimination with the Texas Commission on Human Rights and the Equal Employment Opportunity Commission ("EEOC") (R.I at 234; R.IV at 157). The EEOC amended Robb's charge on September 19, 1989 (R.I at 234-35; R.IV

at 100, 158). Robb believed that she was harassed, her position eliminated, and discriminated against because of her age (R.I at 235; R.IV at 157-58).

On September 21, 1989, Herbst called Robb at home (R.I at 232). After first asking about Robb's job search, he then instructed her not to report for work (R.I at 232; R.IV at 174-75). Robb was terminated as of September 30, 1989 (R.I at 182, 231; R.IV at 157-58). Robb was the only employee who was terminated (R.I at 231; R.IV at 56, 97-98, 101). None of the other positions were eliminated from the insurance team or the department (R.I at 231; R.IV at 56, 94, 97-98, 101). Robb was the oldest employee on the insurance team (R.I at 236-39; R.IV at 60). Ford's and Welch's assistant IE positions were not eliminated (R.I at 231; R.IV at 56, 94, 97-98, 101). Both Ford and Welch were younger than Robb (R.I at 169, 175, 227). Robb intended to work for EDS until she retired (R.IV at 45).

ARGUMENT IN SUPPORT OF GRANTING THE WRIT

The lower court should not have granted summary judgment in favor of EDS in this age discrimination case because there was a genuine issue of fact as to whether EDS' proffered justification for eliminating Robb's position and terminating her was a pretext for intentional age discrimination. Since pretext involves a question of the credibility of the reason given by the employer to justify the adverse personnel action, it was not an issue appropriate for resolution by summary judgment.

In any event, Robb's proof in response to the motion was sufficient to require a trial of the case.

1. Legal Background

This is an age discrimination case (R.I at 1-4). Robb alleges that EDS terminated her in violation of the Age Discrimination in Employment Act of 1967 ("ADEA") (R.I at 1-4). The ADEA, simply put, makes it unlawful for an employer to discriminate against a person with respect to her compensation, terms, conditions, or privileges of employment on account of age. 29 U.S.C. § 623. It targets and protects persons age forty and older. 29 U.S.C. § 631(a).

The relative, shifting burdens in a discrimination case are important. First, the plaintiff must establish a prima facie case of discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 5 FEP Cases 965 (1973). Once established, a prima facie case creates a rebuttable presumption that a defendant has engaged in intentionally discriminatory conduct. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254, 25 FEP Cases 113, (1981). The burden of production shifts to the defendant once the plaintiff has made out a prima facie case of discrimination. *McDonnell Douglas Corp. v. Green*, *supra*, 411 U.S. at 802, 5 FEP Cases at 969.

When the burden shifts, the defendant must articulate a "legitimate, nondiscriminatory" reason for its action against the employee. *McDonnell Douglas Corp. v. Green*, *supra*, 411 U.S. at 802, 5 FEP Cases 969. In *Texas Dep't of Community Affairs v. Burdine*, the Court dealt

specifically with "the nature of the evidentiary burden placed upon a defendant in an employment discrimination suit" once a prima facie case has been made. *Texas Dep't of Community Affairs v. Burdine, supra*, 25 FEP Cases at 114. As noted by the Court, the "burden" which shifts to a defendant once the presumption of discrimination is created is one of production of evidence:

> The defendant must *clearly* set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection.

Texas Dep't of Community Affairs v. Burdine, supra, 25 FEP Cases at 116 (emphasis added).

If the employer meets its burden of production[2], a plaintiff must then be given the opportunity to show that the reason asserted is pretextual, *i.e.*, not the true reason for the employment decision, or that the employer's

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[2] While a successful rebuttal of the prima facie showing will dispel the otherwise mandatory inference of discrimination, the court is bound to consider the evidence adduced in the determination of the prima facie case on the ultimate issue of discrimination. *Texas Dep't of Community Affairs v. Burdine, supra*, 450 U.S. at 22 n.10, 25 FEP Cases at 116 n. 10. *See also United States Postal Serv. v. Aikens, supra*, 460 U.S. at 718, *Thornbrough v. Columbus & Greenville R.R. Co.*, 760 F.2d 633, 640 and n.7 (5th Cir. 1985), *disapproving* the previous view expressed in *Reeves v. General Foods Corp.*, 682 F.2d 515 (5th Cir. 1982); *Sylvester v. Callon Energy Serv.*, 724 F.2d 1210, 1213 (5th Cir. 1984).

explanation "is unworthy of credence." *Texas Dep't of Community Affairs v. Burdine*, 25 FEP Cases at 116.

Once an employer meets this burden of production, the focus proceeds to a higher level of specificity, requiring an analysis of the *credibility* of the reason asserted to justify the adverse personnel action. In other words, the burden returns to the plaintiff to show that the reason is probably not the true reason.

> The plaintiff can do this in two ways, "either [1] directly by persuading the court that a discriminatory reason more likely motivated the employer [2] indirectly by showing that the employer's proffered explanation is unworthy of credence." *Burdine*, 450 U.S. at 256 . . .; *see also Bohrer v. Hanes Corp.*, 715 F.2d 213, 218 (5th Cir. 1983), cert. denied, _____ U.S. _____, 104 S.Ct. 1284, 79 L.Ed.2d 687 (1984) . . . By disproving the reasons offered by the employer to rebut the plaintiff's prima facie case, the plaintiff recreates the situation that obtained when the prima facie case was initially established: in the absence of any known reasons for the employer's decision, *we presume* that the employer was motivated by discriminatory reasons.

Thornbrough v. Columbus & Greenville R.R. Co., 760 F.2d 633, 639-40 (5th Cir. 1985)(footnote omitted; emphasis added). *Accord, Ratliff v. Governor's Highway Safety Program*, 791 F.2d 394-40 FEP Cases 1729, 1733 (5th Cir. 1986). *See also Chaiffetz v. Robertson Research Holding, Ltd.*, 798 F.2d 731, 41 FEP Cases 1097, 1099

(5th Cir. 1986); *Sylvester v. Callon Energy Serv., Inc.*, 724 F.2d 1210, 34 FEP Cases 89 (5th Cir. 1984).

If the fact finder disbelieves the reasons asserted by a defendant to justify its action against a plaintiff, then the fact finder becomes entitled to infer that the action was rooted in unlawful discrimination. *See St. Mary's Honor Center v. Hicks,* _____ U.S. _____, 61 U.S.L.W. 4782 (U.S., June 25, 1993).

Because the lower courts *decided* the dispositive issue of "pretext" by summary judgment, it is likewise appropriate to consider the controlling provisions of Fed. R. Civ. P. 56(c), which permits entry of judgment for the movant only when the evidence shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

Rule 56 is designed to provide a procedural avenue for the quick disposition of *meritless* claims and defenses. *See generally* Schwarzer, *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact*, 99 F.R.D. 465 (1984). Its use is proper, if at all, only where a moving party has satisfied the court that there exists "no genuine issue as to any material fact." Fed. R. Civ. P. 56(c). Doubts as to the existence of genuine issues should be resolved against the moving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970); *Page v. Delaune*, 837 F.2d 233, 2 IER Cases 1873, 1877 (5th Cir. 1988). Summary disposition should not be allowed unless it is clear that a trial on the issue is unnecessary. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). If the moving party appears to meet its burden to establish the absence of evidence to support the nonmovant's claim, only

then must the nonmovant come forth and make a showing which indicates the existence of a fact issue. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

> Of course, a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrates the absence of a genuine issue of material fact.

477 U.S. at 323.

2. Standard of Review

In reviewing the decisions below, the Court is to apply the same legal standard as that which governs the trial court's action, *i.e.*, whether a genuine issue of material fact exists. *See Weyant v. Acceptance Ins. Co.*, 917 F.2d 209, 212 (5th Cir. 1990). "The test is identical to that used for a directed verdict: 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law'." *Chiari v. City of League City*, 920 F.2d 311, 314-15 (5th Cir. 1991, *quoting Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986). In reviewing the lower court's decision, however, it is incumbent on this Court to assess the evidence in the light most favorable to Robb, the non-movant. *Bodnar v. Synpol, Inc.*, 843 F.2d 190, 192 (5th Cir. 1988). If a question of law becomes controlling, the trial court's decision is subject to full

review. *Brooks, Tarlton, Gilbert, Douglas & Kessler v. U.S. Fire Ins. Co.*, 832 F.2d 1358, (5th Cir. 1987).

3. *A Genuine Issue of Material Fact Exists Relating to the Pretextuality of the Reason Asserted by Defendant to Justify Robb's Discharge. Thus, Summary Judgment Was Inappropriate.*

In this case, the trial court granted summary judgment because the court found that Robb did not establish that EDS' articulated reasons for terminating Robb were a pretext for intentional age discrimination (Appendix A, R.I at 357-377). It is clear that the lower court demanded, and the Fifth Circuit agreed, that Robb *prove* that the reasons asserted by defendant to justify her firing were pretextual, not merely that a genuine issue of fact existed with respect thereto. *Id.* at 367. Whether EDS has proffered a credible or otherwise legally unassailable reason for eliminating Robb's position and terminating her is not generally a question appropriate for summary judgment in the first instance. Clearly, however, a plaintiff is not required to *prove by a preponderance of the evidence* in summary judgment proceedings that the defendant's reasons are pretextual or that they lack credibility. Yet, this is precisely what the trial court required (Appendix A, R.I at 367). To the contrary, Fed. R. Civ. P. 56 requires only that Robb establish that a genuine fact issue exists with respect to the issue of pretext.

Where the basis for the granting of summary judgment is that defendant has proffered a legitimate reason for an adverse personnel action that allegedly negates a finding of discrimination, the employer's motive is immediately in question, and the issue of credibility of that reason is

raised. "Therefore, because 'the issue of pretext turns on ... credibility [,it] is not appropriate for resolution on a summary judgment motion'." *Jackson v. University of Pittsburgh*, 826 F.2d 230, 44 FEP Cases 977, 981 (3rd Cir. 1987), *quoting Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893, 901, 43 FEP Cases 681 (3rd Cir. 1987). *Accord Haglof v. Northwest Rehabilitation*, 910 F.2d 497, 54 FEP Cases 1211 (8th Cir. 1990). *See also* S. Fitzwater, *et al.*, *Recent Summary Judgment Jurisprudence for the Fifth Circuit Practitioner*, 5 Fifth Circuit Reporter 769, 770-71 (West, 1988). While the Fifth Circuit may not agree with other circuits' expressions (as the circuit indicated in its opinion here), there is a simple good reason why the issue of pretext should not be resolved in summary judgment proceedings when the non-movant has proffered a substantive, head-on response, namely: an analysis of the pretext issue involves determinations of credibility.

At most, to defeat a summary judgment bottomed on a defendant's proffer of an alleged nondiscriminatory reason for an adverse personnel action, a plaintiff "need only to point to evidence establishing a reasonable inference that the employer's proffered explanation is unworthy of credence." *Sorba v. Pennsylvania Drilling Co., Inc.*, 821 F.2d 200, 44 FEP Cases 54, 58 (3rd Cir. 1987). Robb met this challenge. *See* Statement of the Case, *supra*, at 4-7. The district court clearly required more. *See* Appendix A, R.I at 367.

Apart from this, there was sufficient evidence at the summary judgment stage to call the defendant's articulated reason into question and require that the matter proceed to trial. For example, Robb was not given a full opportunity to use the internal transfer system of the company (R.I at

231), despite her entitlement to do so. EDS' reason for not giving Robb that opportunity was that it had a policy which prohibited the use of the internal transfer system twice in a six-month period (R.I. at 106). Robb last used the internal transfer system on February 6, 1989 (R.I at 71). Had EDS followed its policy, Robb should have been allowed to use the system after August 6, 1989. EDS did not give a nondiscriminatory reason for its failure to follow its own policy.

Moreover, the credibility of the reasons articulated to justify Robb's firing are called into question by various other items of evidence before the district court. Among these are: Plaintiff's observation of defendant's treatment of younger employees; the fact that Robb's was the only job eliminated and that two younger individuals in comparable positions were not discharged; and her history of good performance.

EDS' failure to follow its own policy of placing Robb on the internal transfer system after the six-month period resulted in Robb not finding another position within EDS and, eventually, her termination (R.I at 106). This is significant evidence of pretext.

Thus, the court erred in finding that EDS' articulated reason for Robb's treatment was, as a matter of law, not pretextual. Pretextuality is a central issue in a case of this nature. The district court erred in holding against the plaintiff, both in application of law and in the factual assessment.

CONCLUSION

Because the lower courts clearly have erred in granting summary judgment against the plaintiff, this Court should grant the writ and set this case for briefing and argument.

Respectfully submitted,

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APPENDICES

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

MARY A. ROBB,

Plaintiff,

v. CIVIL ACTION NO. 3-90-1575-P

ELECTRONIC DATA SYSTEMS,

Defendant.

(Filed September 4, 1992)

(Entered on Docket September 10, 1992)

MEMORANDUM OPINION AND ORDER

Now before the Court is the Motion for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure and Local Rule 5.2(a), of the defendant, ELECTRONIC DATA SYSTEMS ("EDS").

I. INTRODUCTION

EDS moves for summary judgment on the plaintiff's, Mary A. Robb ("Robb"), claim of discrimination in violation of the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 et seq. ("ADEA").

The pleadings on file, the deposition excerpts and the supporting affidavits filed with this Court show that there is no genuine issue as to any material fact and that EDS is entitled to judgment as a matter of law.

II. FACTS

Examining the record in the light most favorable to plaintiff, the facts are as follows.

Robb was born May 9, 1935. At all times relevant to this lawsuit, Robb was over the age of 40.

Robb was hired by EDS on October 22, 1984 at the age of 49. She worked for EDS until her position was eliminated on September 30, 1989. At that time, she was 54 years of age.

Robb began her employment with EDS as an Administrative Assistant in the Financial Services Department of EDS. Her manager in that job was Joe Dorfmeister, born on January 22, 1943.

On or about April 1, 1988, Robb sought a transfer to a more technical position which entailed traveling. At that

time, she was unwilling to relocate and was unwilling to work the third shift.

On or about April 27, 1988, Robb received a transfer to the Productivity Services Department of EDS.

The basic function of the Productivity Services Department is to support EDS customers by studying their productivity and making recommendations for improving productivity and achieving cost savings.

The Productivity Services Department is divided into three sub-divisions or teams, each of which supports a different business segment of EDS customers. The teams are insurance, finance and corporate.

Each team consisted generally of one or more managers or supervisors, several Industrial Engineers ("IE") and one Assistant IE. All team employees stepped in for each other.

Robb held the position of Assistant IE for the insurance group. Her manager in that job, and for the remainder of her employment at EDS, was Darell Herbst, born on May 16, 1941.

Robb's duties as the Assistant IE for the insurance group were, first and foremost, to assist the I.E.s in fulfilling their responsibilities. She was to "support IE Projects" by assisting in the generation of reports and proposals and assisting in research, among other tasks.

The creation of reports was the primary task of Robb's position. Robb also managed personal computers and software and helped train new personnel on the personal computers. Robb also assisted the other assistant I.E.'s training the new personnel when the other assistant I.E.'s were busy.

On or about August 15, 1988, after only a few months as the Assistant IE for the insurance group, Robb sought another transfer to a more technical position entailing over 75% travel. Again, Robb was unwilling to relocate to pursue such a position and was unwilling to work the third shift.

Robb did not obtain the transfer she had sought in August 1988, and on or about February 6, 1989, she sought another transfer, again to a more technical position entailing travel. Unlike her previous transfer requests, on this occasion Robb indicated a willingness to relocate, albeit only to the West.

In 1989, the insurance group of the Productivity Services Department experienced a shift in the nature of its work. Instead of generating numerous large reports and proposals for recommended action by the customers, the insurance team assumed the responsibility for actually implementing the suggested improvements. This created more work that the IEs were required to handle personally, and eliminated work that they could delegate to the Assistant IE.

Robb's immediate supervisor, Ms. Kitchens, had personal ill feelings towards Robb. Mr. Herbst had informed Robb that Ms. Kitchen could not work with her. Because of the change in their work, and the personality conflict between Robb and Kitchens, the IEs on the insurance team began to rely less and less on Robb, their Assistant IE. They found that they could complete their work more efficiently and effectively without depending upon her for assistance.

Because the Assistant IE position on the insurance team was underutilized, Robb's time could not be billed to EDS customers at the level management expected. Management sought to bill at least 80% of each employee's work time, but less than 25% of Robb's time could be billed.

These changes did not affect the other two teams in the Productivity Services Department. They continued to perform as before, with the IEs in those groups placing substantial reliance on their Assistant IEs. Those teams did not, however, have a need for more than one Assistant IE each.

The Assistant IE for the finance group was Penny Welch, born on July 22, 1958, and the Assistant IE for the corporate group was Rosalynn Ford, born on September 20, 1946.

Both of these individuals had greater experience as Assistant IEs than Robb. Welch became an Assistant IE in

1986 and Ford became an Assistant IE in 1985, while Robb did not become an Assistant IE until 1988. Robb had more experience and knowledge in computers than the other assistant I.E.s.

Both Welch and Ford had greater overall seniority at EDS than Robb. They were each hired by EDS in 1980, while Robb was not employed by EDS until 1984. Robb has alleged that Welch was often out of the office and difficult to find when needed for a project. Robb has also alleged that Welch "threw tantrums" when she had to do something she did not like or want to do.

Both Welch and Ford had higher performance ratings than Robb at the time Robb's employment terminated. They were each rated "Solid Exceeds" expectations at that time, while Robb was rated "Solid Generally Meets" expectations, **two levels below the others' ratings.**

Neither Welch nor Ford was managed by Darell Herbst, and he did not have the authority to affect their employment status in any way. Mr. Herbst's authority was not exclusive to the insurance team.

After concluding that he could no longer justify maintaining the Assistant IE position for the insurance group, Darell Herbst notified Robb on August 25, 1989 that her position would be eliminated effective September 30, 1989.

Employees are not allowed to access the Internal Openings and Placement list. The employees manager has to initiate the process in Internal Openings and Placements. Because of her previous transfer requests, Robb was ineligible in August 1989 to enter formally into EDS' Internal Transfer ("IT") program. However, on or about August 28, 1989, Mr. Herbst accessed the position openings in the IT program and allowed Robb to peruse the listed openings and to pursue any position for which she believed she was qualified.

Together, Robb and Herbst identified two internal job openings for which she appeared to be at least minimally qualified. She phoned the manager of one of the available positions. He informed her she did not qualify for the job.

During her five-week notice period, Robb was allowed to be absent from work with pay whenever necessary to pursue either internal or external job opportunities. During the last ten days or so of the five-week notice period, Mr. Herbst called Robb at home. He asked Robb how the search was going and said that since it was getting down to the last week of the thirty day notice she did not have to bother coming into the office.

At the time her employment terminated, Robb had a vested benefit in the EDS Retirement Plan, which she will be entitled to receive when she reaches normal retirement age.

Prior to the time her employment terminated, on September 13, 1989, Robb filed a "Charge of [Age] Discrimination" with the Equal Employment Opportunity Commission ("EEOC"). She filed an Amended Charge on September 19, 1989. The Amended Charge was still being investigated when Robb filed the present lawsuit on July 5, 1990, resulting in the termination of the EEOC's investigation.

STANDARDS FOR SUMMARY JUDGMENT

Pursuant to Rule 56(c) Fed. R. Civ. Proc., summary judgment is appropriate only if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Anderson v. Liberty Lobby, 477 U.S. 242, S. Ct. 2505, 91 L. Ed.2d 202 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed.2d 265 (1986). The burden of showing entitlement to summary judgment falls squarely and with great weight upon the moving party. Pitts v. Shell Oil Company, 463 F.2d 331 (5th Cir. 1972). For summary judgment to enter, the pleadings, depositions, admissions, and affidavits, must be considered in the light most favorable to the nonmoving party. Galindo v. Precision American Corp., 754 F.2d 1212 (5th Cir.), reh'g denied, 762 F.2d 1004 (1985).

Once a properly supported motion for summary judgment is made, the adverse party must set forth specific facts showing that there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106

S. Ct. 2505, 91 L. Ed.2d 202 (1986). The substantive law will identify what facts are material. Id. at 248. A dispute as to a material fact is "genuine" only if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Id. at 248.

Federal courts interpreting Rule 56 have uniformly recognized that evidence of a plaintiff's belief, or testimony based on conjecture, with no specific facts to support the belief or conjecture is insufficient to raise a genuine issue of material fact. E.g., Slaughter v. Allstate Ins. Co., 803 F.2d 857, 860 (5th Cir. 1986). Conclusory allegations fare no better. Laurence v. Chevron, U.S.A., Inc., 885 F.2d 280, 285 (5th Cir. 1989).

As demonstrated below, Robb cannot sustain her burden of presenting sufficient evidence to warrant a trial in this case. Specifically, she cannot present any evidence which could cause a reasonable trier of fact to conclude that she was discriminated against based upon her age.

AGE DISCRIMINATION STANDARDS

An analysis of the burdens of proof and persuasion under the ADEA demonstrates why summary judgment is appropriate in this case. The United States Supreme Court has articulated the order and allocation of proof applicable to discrimination cases. The Court first announced the standard for establishing a prima facie discrimination case in a hiring context under Title VII of the Civil Rights Act

of 1964. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

Although the standard for a prima facie case was established in a hiring case under Title VII, the courts apply this test, or appropriate modifications of the test, to litigation involving other types of employment actions, including discrimination based on age. E.g., Laurence, supra, 885 F.2d at 285 (alleged age-based failure to promote). For example, a prima facie case of discriminatory discharge under the ADEA requires the plaintiff to show that:

1. She was over 40 years of age;

2. She was discharged;

3. She was qualified for the position she held; and

4. After her discharge, the employer filled the position with someone sufficiently younger to permit an inference of age discrimination. E.g., Burns v. Texas City Refining, Inc., 890 F.2d 747, 750 (5th Cir. 1989), reh'g and reh'g en banc denied, 896 F.2d 549 (5th Cir. 1990); Bienkowski v. American Airlines, Inc., 851 F.2d 1503, 1506 (5th Cir. 1988).

In a situation where the plaintiff's position is not filled, such as the present case, the third and fourth elements are modified to make them appropriate under the circumstances. The modified elements are that:

3. The plaintiff was qualified to assume another position with the employer; and

4. There is evidence from which a fact finder might reasonably conclude that the employer intended to discriminate in reaching the decision at issue. E.g., Sherrod v. Sears, Roebuck & Co., 785 F.2d 1312, 1314 (5th Cir. 1986).

Assuming the plaintiff can establish a prima facie case, and thereby meet her initial burden of production, the employer must then articulate a non-discriminatory reason for its actions. After the defendant has met this burden of production, the plaintiff must demonstrate that the employer's stated reason for its actions was a pretext for illegal age discrimination. E.g., Little v. Republic Refining Co., 924 F.2d 93, 96 (5th Cir. 1991).

While the burden of production shifts from the plaintiff to the defendant and back to the plaintiff, the burden of persuading the fact finder that intentional discrimination exists always remains with the plaintiff. E.g., Price Waterhouse v. Hopkins, 490 U.S. 228, 245 (1989); U.S. Postal Service Bd. of Governors v. Aikens, 460 U.S. 711, 714, 716 (1983); Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253, 256 (1981). Moreover, "a plaintiff whose employment position is eliminated in a corporate reorganization or work force reduction carries a heavier burden in supporting charges of discrimination than does an employee discharged for other reasons." Wilson v. Firestone Tire & Rubber Co., 932 F.2d 510, 517 (6th

Cir. 1991). Accord, Aungst v. Westinghouse Electric Corp., 937 F.2d 1216, 1220-21 (7th Cir. 1991).

Under Rule 56, and pursuant to the dictates of Celotex, supra, summary judgment on the merits is appropriate in age discrimination cases. Slaughter, supra, 803 F.2d at 860-61. Summary judgment may be granted in discrimination cases when the defendant demonstrates that the plaintiff cannot establish a prima facie case of intentional discrimination. E.g., Huhn v. Koehring Co., 718 F.2d 239, 245 (7th Cir. 1983), reh'g and reh'g en banc denied (7th Cir. 1984) (summary judgment for employer affirmed where plaintiff could not "demonstrate that he was qualified to continue in his sales position in the sense that his performance did, in fact, meet [the employer's] legitimate expectations.")

It is important to note that "establishment of a prima facie case of employment discrimination does not automatically entitle the plaintiff to a jury determination of the discrimination claim." Bienkowski, supra, 851 F.2d at 1505, n. 1.

Summary judgment also is appropriate when the plaintiff cannot sustain her burden of proving that the defendant's articulated non-discriminatory reason for the adverse employment action was a pretext for intentional discrimination. Slaughter, supra, 803 F.2d at 860-61.

ISSUE OF LAW

1. Whether Robb can produce sufficient evidence to establish that EDS' articulated reasons for eliminating her position were a pretext for intentional age discrimination.

For purposes of addressing the issue of pretext, the Court assumes that Robb has established a prima facie case. Based upon this assumption, the burden of production shifts to EDS to articulate a non-discriminatory reason for its actions. While an employer need not persuade a court that the proffered reason actually motivated its decision, the defendant's evidence must raise "a genuine issue of fact as to whether it discriminated against the plaintiff." Laurence, supra, 885 F.2d at 283 (citations omitted). While the burden of production shifts, the burden of persuasion always remains with the plaintiff. E.g., Burdine, supra, 450 U.S. at 256.

As described in his Affidavit, Darell Herbst decided to eliminate Robb's position when the nature of the work in his department changed and her services could not be utilized fully. Robb acknowledges that this was the only reason proffered by Mr. Herbst for the termination of her employment. A more detailed explanation of EDS' reasons for eliminating Robb's position, and her inability to find another position within EDS, may be found in the above statement of facts. Since EDS has articulated these non-discriminatory reasons for Robb's discharge, Robb must now have the opportunity to demonstrate that the proffered reason was not the true reason for the

employment decision. The plaintiff retains the burden of persuasion. This burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination. She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence. See McDonnell Douglas, 411 U.S., at 804-805.

ROBB'S ATTEMPTS TO SHOW PRETEXT

Robb does not claim that any age-related remarks ever were made by EDS personnel. There is no evidence of any age-based comments made at any time by anyone. In the absence of such evidence, Robb relies upon little but her own supposition that age discrimination occurred. As demonstrated below, what little evidence Robb can muster is legally insufficient to reach the jury on the issue of pretext.

1. Robb's Subjective Belief of Pretext.

Robb relies on her own belief that age was adetermining factor in the decision to eliminate her position. Yet, it is well settled that the plaintiff's subjective belief that she was discriminated against will notsuffice to create a genuine issue as to pretext. Little, supra, 924 F.2d at 96; Elliott v. Group Medical & Surgical Services, 714 F.2d 556, 567 (5th Cir. 1983), cert. denied, 467 U.S. 1215 (1984).

Robb's subjective belief is insufficient to show pretext.

2. Robb' s Attempt to Infer Pretext From the Ages Of Employees Who Were Not Terminated.

Robb relies on the fact that the individuals with whom she worked, including the manager who eliminated her position, were younger than her or under the age of 40. Again, such evidence is legally insufficient to demonstrate pretext. Little, supra, 924 F.2d at 96.

Even if it were probative, Robb's inference of age discrimination merely from the ages of others is implausible under the circumstances of this case. She was hired by EDS at the age of 49 by a manager, Joe Dorfmeister, who was also over the age of 40 at the time. Robb later transferred at the age of 52 to another manager, Darell Herbst, who was one month shy of 47 at that time. At the age of 53, Robb was put on a performance improvement plan, but not discharged, by this same manager, who was then 47. Her position was ultimately eliminated when she was 54 and her manager was 48.

There is no plausible evidence that Herbst, an age contemporary of Robb, was motivated by unlawful age animus when he terminated Robb.

The ages of Robb's manager or co-workers are insufficient to show pretext.

3. Robb's attempt to Show Age Bias by the Fact That The Only Position Eliminated Was Then Held by the Oldest Person in the Department.

Robb also relies on the fact that she was the oldest person in her department and was the only person whose position was eliminated. The plaintiff in Sherrod, supra, relied upon exactly the same evidence, which was found to be insufficient to uphold the jury's verdict of age discrimination. 785 F.2d at 1315- 16. As the Fifth Circuit recently observed, the mere fact that an older worker is adversely impacted by the realignment of employees in a corporate reorganization does not demonstrate age bias. Little, supra, 924 F.2d at 98.

To establish intentional discrimination, Robb must show that EDS gave preferential treatment to a younger employee under nearly identical circumstances. Id. at 97. She cannot show this with respect to the employees who assumed what remained of her duties, however, because they were not similarly situated. Robb was an Assistant Industrial Engineer ("IE") and her duties were absorbed by the IEs she was employed to assist. The need for an assistant, and not the underlying IE work, diminished. Robb held the only Assistant IE position in her department, which explains why she was the only person to lose her job when the Assistant IE work evaporated. Thus, it is inappropriate to compare Robb to the IEs she formerly assisted.

Likewise, Robb was not similarly situated to the two Assistant IEs in the other departments. It is uncontroverted that their job responsibilities did not diminish because of changes in customer requirements, as Robb's did. In addition, **both had performance ratings two levels higher than Robb's rating, both had four years more EDS seniority than Robb had and both had at least two years more experience as Assistant IEs than Robb had.** Thus, it also is inappropriate to compare Robb to the Assistant IEs in her sister departments. There simply is not anyone younger, or older for that matter, to whom Robb can point who received preferential treatment under identical, or even similar, circumstances to hers. Although it is unfortunate for Robb, she was the lone occupant of a position which was no longer needed. But the elimination of that position does not become age discrimination just because its holder happened to be over 40, and other employees under 40 remained employed in different positions and different departments.

The fact that the only position eliminated was then held by the oldest person in the department is insufficient to demonstrate age bias.

4. Robb's Attempt to Show Pretext by Her Proximity To Retirement at Termination.

Robb also relies on her belief that EDS sought to prevent her from vesting in the EDS Retirement Plan by terminating her employment 22 days before she vested. This theory has no factual basis because, as Robb

ultimately acknowledged, she was, in reality, already vested at the time her employment terminated. She will, in fact, be receiving her benefits at normal retirement age.

Nevertheless, Robb continues to cling to the theory that EDS realized a savings in its Retirement Plan by terminating her employment. Although it is self-evident that retirement costs, or any other benefit for that matter, may be reduced by reducing the number of employees eligible for the benefit, the same savings could be realized by discharging younger employees, or even older employees who are not vested. Robb does not even purport to explain how any alleged savings is achieved by discharging older vested workers, such as herself.

To illustrate the fallacy of Robb's theory, it is necessary to look no further than the other two Assistant IEs. They both had more years of EDS service than Robb, and they also had more years of potential service remaining before normal retirement age. Because their retirement benefits will be correspondingly higher at age 65, EDS could have saved more by terminating their employment than by terminating Robb's employment. Robb herself was over 11 years away from retirement at the time her employment terminated. Nothing but Robb's own conjecture suggests that EDS had a plan to reap savings 11 years hence by eliminating her position in the present. Moreover, even Robb admits that she does not know what, if any, savings would have been realized by this purported 11-year plan.

Even if Robb could establish some factual connection between her proximity to normal retirement age, and the decision to eliminate her position, such evidence is legally insufficient to establish that EDS' reasons for eliminating her position were pretextual. As stated in Williams v. General Motors Corp., 656 F.2d 120 (Sth Cir. 1981):

> [S]eniority and age discrimination are unrelated. The ADEA targets discrimination against employees who fall within a protected age category, not employees who have attained a given seniority status. . . . We state without equivocation that the seniority a given plaintiff has accumulated entitles [her] to no better or worse treatment in an age discrimination suit. Id. at 130, n. 17.

5. Robb's Attempt to Show Pretext As a Result of Her Disagreement with Management Over the Quality of Her Performance or the Decision to Eliminate Her Position.

Robb apparently takes issue with EDS' evaluation of her performance and attitude. She even claims that her manager did not have sufficient knowledge of their department's work to rate her performance. However, "[s]tatements made by inferior employees are not probative of an intent to discriminate by the decisions." Aungst, supra, 937 F.2d at 1221.

Moreover, "[t]he existence of competing evidence about the objective correctness of a fact underlying [EDS']

proffered explanation does not in itself make reasonable an inference that [EDS] was not truly motivated by its proffered justification....[E]ven an incorrect belief that an employee's performance is inadequate constitutes a legitimate, non-discriminatory reason." Little, supra, 924 F.2d at 97. "The ADEA cannot protect older employees from erroneous or even arbitrary personnel decisions, but only from decisions which are unlawfully motivated." Laurence, supra, 885 F.2d at 285.

In a reduction in force context, it is inevitable that good, or even excellent, performers may lose their jobs. Thus, even if Robb was correct that her performance rating was lower than it should have been, that would not have saved her job. The duties of her position, not those of the other Assistant IEs, evaporated. Indeed, even Robb acknowledges that she did not have complete knowledge of the responsibilities of those other positions. Based upon those undisputed facts, Robb's manager decided to eliminate her position in the exercise of good faith business judgment. The ADEA does not entitle the federal courts to second-guess that decision. Bienkowski, supra, 851 F.2d at 1507-08. Accord, Elliott, supra, 714 F.2d at 567 (employer entitled to make subjective judgment that one employee will do better job than another).

6. Robb's Attempt to Show That She Was Harassed Because of Her Age.

Robb relies upon the allegation that she was "harassed" by her manager or co-workers. The instances of "harassment" included the following:

a. A co-worker would "mess up PCs," refuse to communicate and restrict the flow of information in the workplace,

b. This same co-worker used "little yellow stick-ums" to advise Robb of revisions to their work product,

c. Robb's ideas for creating standard forms to use in her work were not accepted by her management,

d. Robb was asked to demonstrate why one of her work projects could not be completed as required; and

e. Robb was placed on a performance improvement plan by her manager.

Robb cannot connect a single one of these incidents of "harassment" to her age. She testified as follows:

Q.Was he doing that [items "a" and "b" above] because of age?

A.How should I know why he was doing it.

Q.Did you believe that he was doing it because of age?

A.Did I believe? Goodness. I don't know.

* * *

Q.No. Was what Bob Tennant did, at least in your view, based on age?

A.I don't know.

* * *

Q.Okay. As we sit here right now this minute, do you think so?

A.I have no idea.

* * *

Q.Do you believe it [item "c" above] was because of your age?

A.I don't know.

* * *

Q.Do you think it [item "d" above] was because of your age?

A.I have no idea.

* * *

Q.Okay. Is it your belief that you were put on this Performance Improvement Plan in August of 1988 [item "e" above] because of age discrimination?

A.I don't know.

* * *

Q. You don't know. Is it your belief that you were called into the office and originally told you were going to be let go because of age discrimination?

A. I don't know.

* * *

Q. Was the motive for telling you that at that time [item "e" above], as far as you knew because of your age?

A. It wasn't my motive, so I had no idea.

Q. At that time, did you believe it was because of your age?

A. I had no idea what motive it was.

Q. Did you believe it was because of your age?

A. I have no idea what the motive was

7. Robb's allusion to statistical evidence of age bias to show to demonstrate pretext.

Robb apparently believes that statistical analysis would demonstrate a tendency on EDS' part to discharge older workers or to recruit younger ones. However, no such analysis has been undertaken or presented. Robb's mere conjecture that EDS prefers younger employees is insufficient to raise a genuine issue of material fact. Slaughter, supra, 803 F.2d at 860.

Even if a statistical analysis had been done, it would not be sufficient to demonstrate intentional discrimination

against Robb. Williams, supra, 656 F.2d at 130, n. 17 ("bare fact that an employer encourages employment of recent college . . . graduates does not constitute unlawful age discrimination"); Sessions v. Rusk State Hosp., 648 F.2d 1066, 1071 (5th Cir. 1981)("statistical evidence buttresses [plaintiff's] prima facie case, but it does not demonstrate [pretext]").

In short, Robb is asking this Court to find age discrimination simply because she cannot accept the fact, or does not recall, that EDS had other legitimate reasons to eliminate her position. Robb is asking this Court to serve as a super-personnel department to review that decision. However, the ADEA neither requires nor sanctions that result.

CONCLUSION

Robb has not shown that EDS' articulated reasons for eliminating her position were a pretext for intentional age discrimination.

Based on the foregoing, EDS is entitled to judgment as a matter of law on Robb's claim of age discrimination, as there are no genuine issues of material fact that would preclude summary judgment.

IT IS SO ORDERED.

Signed September 4, 1992

/s/
JORGE A. SOLIS
UNITED STATES DISTRICT JUDGE

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

MARY A. ROBB	§	
	§	
Plaintiff	§	
	§	CIVIL ACTION NO.
v.	§	3:90-CV-1575-P
	§	
ELECTRONIC DATA SYSTEMS,	§	
	§	
	§	
Defendant	§	

Filed September 10, 1992

AMENDED JUDGMENT

This Judgment is issued pursuant to the Court's Memorandum Opinion and Order dated September 4, 1992.

IT IS ORDERED, ADJUDGED and DECREED by the Court that Plaintiff Mary A. Robb take nothing by her suit against Defendant Electronic Data Systems, and that this suit, be, and it is hereby, DISMISSED on the merits at Plaintiff's cost.

A judgment was entered by the Court on September 9, 1992, but it mistakenly reflected that it was entered May 9, 1992. The Amended Judgment is entered to reflect the correct date.

SIGNED this ____ day of September, 1992.

/s/
JORGE A. SOLIS
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-1875
(Summary Calendar)

MARY A. ROBB

Plaintiff-Appellant,

versus

ELECTRONIC DATA SYSTEMS CORPORATION,

Defendant-Appellee.

Filed April 16, 1993

Appeal from the United States District Court
for the Northern District of Texas
(3:90-CV-1575-P)

BEFORE KING, DAVIS, and WEINER, Circuit Judges.

PER CURIAM:*

---

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense to the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

In this age discrimination suit, Plaintiff-Appellant Mary A. Robb appeals the district court's grant of summary judgment dismissing her claim against her former employer, Defendant-Appellee Electronic Data Systems Corporation (E.D.S.) As the district court, in an apparent effort to enlighten counsel for Robb, painstakenly crafted a lengthy and explicit opinion correctly setting forth the controlling case law which renders Robb's evidence insufficient as a matter of law, we adopt that court's writing and the reasoning within. We add only a few comments to address the arguments asserted by Robb on appeal.

For the first time on appeal, Robb argues that there is a genuine issue of material fact whether EDS' reason for not transferring Robb to another position within the company is pretext. We decline to consider issues that have not been presented to the district court unless the issue is a purely legal one and failure to consider it would work and injustice.[1] Robb has failed to demonstrate that our failure to consider this issue would be unjust and we are convinced that no injustice will result. Consequently, we decline to consider this issue that has not been presented to the district court and has not been ruled on by it.

We write also to emphasize that Robb's brief, although correctly formulating the issue on appeal, fails actually to argue that issue. Instead, it argues that "[w]hether EDS has proffered a credible reason for eliminating Robb's

---

[1]Volkswagen of America, Inc. v. Robertson, 713 F.2d 1151, 166 (5th Cir. 1983).

position and terminating her is not a question for summary judgment." This is simply wrong. In making this argument, Robb's counsel ignores the well-established case law of this Circuit, which the district court cites in its opinion. Counsel does not attempt to distinguish this case law, but instead chooses to ignore it, relying on Third Circuit case law as support. We remind counsel that, as an officer of the court, failing to cite controlling law--especially when one is on notice that controlling precedent exists--is a breach of duty to this court--a breach that can be sanctionable. We assume no more need be said on this issue.

For the reasons set forth in the district court's opinion, the grant of summary judgment is
AFFIRMED.

(2)

Supreme Court, U.S.
FILED
AUG 13 1993
OFFICE OF THE CLERK

No. 93-98

IN THE

Supreme Court of the United States

October Term, 1993

MARY A. ROBB,
Petitioner,

vs.

ELECTRONIC DATA SYSTEMS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF ELECTRONIC DATA SYSTEMS CORPORATION IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Circuit Court properly affirm the trial court's resolution of the issue of pretext on summary judgment in an action brought under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §621 *et seq.*?

2. Did the Circuit Court properly affirm the trial court's holding that Petitioner had not established a genuine issue of material fact on the issue of pretext in this age discrimination case?

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Rule 56, Federal Rules of Civil Procedure 10,15,16

No. 93-98

IN THE

Supreme Court of the United States

October Term, 1993

MARY A. ROBB,
Petitioner,

vs.

ELECTRONIC DATA SYSTEMS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF ELECTRONIC DATA SYSTEMS CORPORATION IN OPPOSITION

STATEMENT OF THE CASE

This age discrimination case was initiated on July 5, 1990, when Petitioner Mary A. Robb ("Petitioner") filed a Complaint in the United States District Court for the Northern District of Texas against her former employer, Respondent Electronic Data Systems Corporation ("EDS"). In that Complaint, Petitioner alleged that EDS

violated the Age Discrimination in Employment Act of 1967, 29 U.S.C. §621 *et seq.* ("ADEA") by eliminating her position and terminating her employment on account of her age (R. Vol. I at 1-4). EDS timely filed an answer denying this allegation and the parties engaged in extensive discovery (R. Vol. I at 5).

Following the close of discovery, EDS filed a Motion for Summary Judgment (R. Vol. I at 68-76). Thereafter, this case was transferred to Judge Jorge A. Solis (R. Vol. I at 123). Pursuant to Court Order, EDS refiled its Motion for Summary Judgment and Supporting Materials on November 22, 1991 (R. Vol. I at 133; Vol. IV). Petitioner filed an extensive 23-page Response to that Motion on December 16, 1991 (R. Vol. I at 192), and EDS filed a Reply Brief on January 14, 1992 (R. Vol. I at 246).

On September 4, 1992, the District Court issued a Memorandum Opinion and Order granting EDS' Motion for Summary Judgment (R. Vol. II at 357-378).[1] In a detailed, scholarly opinion, the Court held that Petitioner failed to raise a genuine issue of material fact as to whether EDS' articulated reason for eliminating Petitioner's position—that the nature of the work in her department changed over time such that her services were no longer needed—was actually a pretext for age discrimination (R. Vol. II at 377). Thus, the District Court concluded that EDS was entitled to judgment as a matter of law.

Petitioner filed a timely Notice of Appeal of the District Court's Order with the Fifth Circuit Court of Appeals. Both parties submitted thorough briefs

[1] The opinion of the District Court is reproduced in Appendix A of Petitioner's *Petition for Writ of Certiorari*.

reflecting their respective positions. On April 16, 1993, in an unpublished opinion, the Fifth Circuit affirmed the District Court's decision.[2]

In that decision, finding that no injustice to Petitioner would result, the Fifth Circuit declined to consider Petitioner's new argument that pretext was evidenced by EDS' failure to follow its own internal transfer system because Petitioner had not presented that issue to the District Court. Additionally, the Court affirmed the trial court's findings that Petitioner otherwise had not come forward with competent evidence establishing an issue of fact as to whether EDS' reasons for terminating Petitioner were merely a pretext for age discrimination. Finally, the Court specifically rejected Petitioner's argument that, as a general proposition of law, the issue of pretext may not be resolved on summary judgment. Following that decision, Petitioner filed her *Petition for Writ of Certiorari* on July 15, 1993.

The underlying facts leading to this *Petition* are as follows. EDS is a Dallas-based company which provides data processing, consulting and other information technology services to business customers throughout the world. Petitioner Mary A. Robb was hired by EDS on October 22, 1984 (R. Vol. I at 1). At that time, she was 49 years old (R. Vol. III at 11).

Petitioner began her employment with EDS as an Administrative Assistant in the Financial Services Department (R. Vol. III at 12). After serving in that position for over three years, Petitioner obtained a transfer to EDS' Productivity Services Department as an Assistant Industrial Engineer (R. Vol. III at 13).

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[2] The Fifth Circuit Court of Appeals decision is reproduced in Appendix C of the *Petition for Writ of Certiorari.*

The basic function of the EDS Productivity Services Department was to study the productivity of EDS' business customers and make detailed recommendations to those customers outlining ways to improve their productivity (R. Vol. I at 104, 112, 118). During Petitioner's tenure in the Productivity Services Department, it was divided into three separate teams which were vertically aligned to separate industries supported by EDS—Insurance, Corporate, and Finance (*Id.*). Upon Petitioner's transfer to the Productivity Services Department she was assigned to the Insurance Team, which was managed by Darell Herbst, who was 46 years old at the time (R. Vol. I at 103). During all times relevant to this lawsuit, Mr. Herbst managed the Insurance Team but did not have any managerial authority over the Corporate or Finance Teams (*Id.*).

As the name suggests, the Insurance Team supported EDS' customers in the insurance industry. This support primarily consisted of conducting productivity improvement studies of the customers' business. Following these studies, the Insurance Team would generate a formal report that contained recommendations as to how the customer could improve productivity to achieve cost savings and a more productive business environment (R. Vol. I at 104).

Throughout Petitioner's tenure in the Productivity Services Department, the Insurance Team was comprised of a number of professional Industrial Engineers ("I.E.'s"), an I.E. Supervisor and one Assistant I.E., Mary Robb (R. Vol. I at 104; *see also* R. Vol. I at 109).[3]

[3] The Corporate Team and the Finance Team were organized in a similar fashion (*See* R. Vol. I at 115). The Assistant I.E. for the Corporate Team was Rosalynn Ford, and the Assistant I.E. for the Finance Team was Penny Welch (R. Vol. I at 112, 115, 118).

Robb's responsibilities as the Assistant I.E. for the Insurance Team were to assist the I.E.'s by helping them generate reports and proposals and by assisting in research, among other tasks. The primary aspect of Robb's position was the preparation of these formal reports for the insurance customers (R. Vol. I at 105, III at 131).

Unfortunately, shortly after assuming her new role as Assistant I.E. to the Insurance Team, Petitioner began experiencing problems in interacting with the I.E.'s she was assigned to support. These problems led Petitioner to ask Herbst if she could seek a transfer out of the Productivity Services Department. Herbst approved this request and authorized Petitioner to access EDS' internal transfer system in July of 1988 (R. Vol. III at 21-22, 155). However, Petitioner's problems with her co-workers continued, forcing Herbst to meet with Petitioner on August 18, 1988, and place her on a written performance improvement plan (R. Vol. III at 145, 151). This plan was designed to address Petitioner's interpersonal problems and improve her performance to an acceptable level (*Id.*). Specifically, Robb was provided with two months to develop a more positive attitude and improve her apparent inability to work effectively with the I.E.'s she was assigned to support (*Id.*). Pursuant to EDS policy, Herbst also removed Petitioner from the EDS internal transfer system because she had been placed on the performance improvement plan (R. Vol. III at 23).

Thereafter, Petitioner successfully completed the terms of her performance plan and was given a performance evaluation by Herbst on October 26, 1988.

As a result of that evaluation, Herbst gave Petitioner a rating of "solid generally meets" (R. Vol. III at 149).[4]

About three months later (in early February of 1989), Petitioner again approached Herbst to seek permission to transfer, and Herbst granted this request (R. Vol. III at 140-41). For the next several months, Petitioner sought a transfer within EDS' internal transfer system but was unable to locate another position.[5]

In the early part of 1989, the Insurance Team experienced significant changes in the nature of its work which essentially involved replacing productivity-related work (the preparation of reports by the I.E.'s with the support of the Assistant I.E.) with implementation-related work (carrying out the recommended business changes for the customer). Stated differently, instead of generating numerous large reports and proposals for recommended action to be taken by its customers, the Insurance Team assumed the responsibility for actually implementing the business improvements it suggested (R. Vol. I at 104-05). These changes resulted in more work that the I.E.'s were required to handle themselves, but reduced work that would ordinarily be delegated to the Assistant I.E. inasmuch as a formal, final report of recommendations was no longer required. The reports that were submitted pursuant to the Insurance Team's implementation activities needed little preparation (*Id.*).

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[4] EDS utilizes a performance rating system consisting of seven levels, ranging from "new to job" to "exceptional". "Solid generally meets" is the third lowest of the seven possible ratings ("new to job" and "marginal" are the only two ratings which are lower) (R. Vol. III at 149-150).

[5] EDS has an internal transfer system whereby available jobs are listed on a computer screen for viewing by employees seeking a transfer within EDS.

Preparation of formal, final recommendation reports was an important aspect of the Assistant I.E. position (R. Vol. I at 105; Vol. III at 131). Consequently, the Insurance Team's need for the Assistant I.E. was substantially diminished (R. Vol. I at 105).

The Insurance Team charged its customers for the services it provided. Members of the Team were expected to bill approximately 80 percent of each team member's work time to the customer. As a result of the shift from the recommendation function to the implementation function and the attendant changes in the responsibilities of the Assistant I.E., EDS was only able to bill less than 25 percent of Petitioner's work time during 1989 (R. Vol. I at 105).

The two other teams in the Productivity Services Department, the Finance Team and the Corporate Team, did not experience similar changes in the nature of their work during 1989. They continued to perform the same functions as they had been performing and the I.E.'s in those groups continuing to fully utilize thei Assistant I.E.'s, Penny Welch and Rosalynn Ford (R. Vol. I at 112-13; 118-19).

As a direct consequence of the dramatically reduced need for an Assistant I.E. on the Insurance Team, Herbst decided to eliminate that position in August of 1989 (R. Vol. I at 105). Accordingly, on August 25, 1989, Herbst notified Petitioner that her position would be eliminated effective September 30, 1989, and that she would need to find another position by that time either within or outside EDS (*Id.*). Though Herbst knew that neither the Corporate or the Finance Team had a need for another Assistant I.E., he was hopeful that Petitioner would be able to obtain another position within EDS (R. Vol. I at 105-06, 113, 119).

Thereafter, Herbst actively attempted to help Petitioner obtain another position within EDS. He contacted EDS' Internal Transfer Department but was advised that Petitioner was ineligible to participate in the internal transfer system because she had been in the system within the past six months (R. Vol. I at 106; Vol. III at 155). Pursuant to this policy, he did not authorize Petitioner to formally enter into the internal transfer system, but he provided Petitioner with access to the system by viewing the positions listed in the system himself and allowing Petitioner to review the list of openings and pursue any position for which she thought she was qualified [6] (R. Vol. I at 106; Vol. III at 77-78). Petitioner took advantage of this opportunity by reviewing the list and jotting down the names of the managers over the positions in which she was interested (R. Vol. III at 77-80). Herbst also set up an interview for Petitioner for a job opening in EDS' Technical Products Division, but Petitioner was not offered that position (R. Vol. III at 76-77).

During the August 25 meeting, Herbst also advised Petitioner that she would be excused from work (with pay) whenever she felt it was necessary to pursue any internal or external job opportunities (R. Vol. I at 106). Thereafter, when it became apparent that Petitioner's job search had not been successful, Herbst advised Petitioner that she did not have to come into work at all during the last two weeks of September so that she could fully concentrate on her efforts to obtain another position (R. Vol. I at 106). Unfortunately, Petitioner was

[6] Though EDS generally requires that the manager (rather than the employee) contact the hiring manager for job openings listed in the internal transfer system, Mr. Herbst allowed Petitioner to contact the managers directly in an effort to streamline her job search (R. Vol. III at 79-80). Robb only contacted two of these managers (R. Vol. I at 232-33, ¶22).

unable to secure a position by September 30. Accordingly, Herbst terminated Petitioner on that date (*Id.*). At that point, the position of Administrative I.E. on the Insurance Team was eliminated and Petitioner has not been replaced (R. Vol. I at 106-7, 110).

In anticipation of her pending job elimination on September 30, 1989, Petitioner filed a charge of discrimination with the Equal Employment Opportunity Commission on September 13, 1989, alleging that EDS engaged in age discrimination by eliminating her position (R. Vol. III at 157). She filed an amended charge on September 19, 1989 (R. Vol. III at 158). The amended charge was still under investigation when Petitioner filed the present lawsuit on July 5, 1990, which ended the agency's investigation.

SUMMARY OF ARGUMENT

This case is a garden variety age discrimination lawsuit. The Fifth Circuit's opinion does not present a conflict among the Circuit Courts of Appeal, despite Petitioner's efforts to manufacture one. Additionally, the opinion does not present important questions of federal or constitutional law. Rather, in simplest terms, this appeal represents nothing more than Petitioner's final effort to avoid her failure to gather sufficient evidence of pretext at the trial court level to overcome EDS' Motion for Summary Judgment.

Relying upon a stray quote from a Third Circuit Court of Appeals decision, Petitioner first seeks to invoke this Court's review based on the novel theory that, in age discrimination lawsuits, the issue of pretext may not be resolved on summary judgment as a matter of law. Unfortunately, this bold proposition of law is belied by numerous decisions by the various Circuit Courts of Appeal and is directly contrary to this Court's interpretation of Rule 56 of the Federal Rules of Civil Procedure. In fact, even the Third Circuit Court of Appeals itself has explicitly rejected the very proposition upon which Petitioner bases her request for review. Therefore, Petitioner's misguided proposition of law does not justify full review by this Court.

Likewise, Petitioner's suggestion that review is warranted because the Fifth Circuit Court of Appeals incorrectly affirmed the trial court's holding that Petitioner did not establish a genuine issue of pretext is similarly unavailing. Simply put, this Court need not expend its limited resources on an appeal that is of no interest to anyone other than the parties involved. Moreover, Petitioner is simply wrong in asserting that she has come forward with sufficient evidence to warrant a jury trial in this case. Thus, Petitioner has not established grounds for further review of this case, and her *Petition* should be denied.

ARGUMENT

I. The Fifth Circuit Court Of Appeals Correctly Ruled That The Issue Of Pretext May Be Resolved On Summary Judgment.

Age discrimination lawsuits are evaluated under the traditional *McDonnell Douglas Corp. v. Green*[7] burden shifting analysis. *See Hazen Paper Co. v. Biggins*, _____ U.S. _____, 61 USLW 4323 (1993). Under that analysis, a *prima facie* case of discriminatory discharge under the ADEA requires the plaintiff to show that:

1. She was over 40 years of age;

2. She was discharged;

3. She was qualified for the position she held, and

4. After her discharge, the employer filled the position with someone sufficiently younger to permit an inference of age discrimination.

See McDonnell Douglas Corp. at 802.

In a reduction in force case such as this one, the third and fourth elements are modified to make them appropriate for the circumstances. The modified elements are that:

3. The plaintiff was qualified to assume another position with the employer; and

4. There is evidence from which a fact finder might reasonably conclude that the employer intended to discriminate in reaching the decision at issue.

See e.g., Amburgey v. Corhart Refractories Corp., Inc., 936 F.2d 805, 815 (5th Cir. 1991).

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[7] 411 U.S. 792 (1973).

In the event that the plaintiff establishes a *prima facie* case and thereby meets her initial burden of production, the employer must then articulate a nondiscriminatory reason for its actions. *Texas Dep't. of Community Affairs v. Burdine,* 450 U.S. 248, 254 (1981). This burden is not onerous. *Id.*

After this burden of production is met, the plaintiff must demonstrate that the employer's stated reasons for its action were actually a pretext for illegal age discrimination. *Burdine,* 450 U.S. at 253. While the burden of production shifts from the plaintiff to the defendant and back to the plaintiff, the burden of persuading the fact finder that *intentional* discrimination exists always remains with the plaintiff. *See e.g., St. Mary's Honor Center v. Hicks,* _____ U.S. _____, 61 USLW 4782, 62 FEP Cases (BNA) 96 (June 25, 1993); *U.S. Postal Service Bd. of Governors v. Aikens,* 460 U.S. 711, 714-716 (1983); *Burdine,* 450 U.S. at 253.

In meeting this ultimate burden, this Court has recently clarified that "a reason cannot be proved to be 'a pretext *for discrimination*' unless it is shown both that the reason was false, and that discrimination was the real reason." *Hicks,* 62 FEP at 102 (emphasis original). Thus, "[i]t is not enough . . . to *dis*believe the employer; the fact finder must *believe* the plaintiff's explanation of intentional discrimination." *Id.* at 104 (emphasis original). Moreover, as noted by several Circuit Courts of Appeal, "a plaintiff whose employment position is eliminated in a corporate reorganization or work force reduction carries a heavier burden in supporting charges of discrimination than does an employee discharged for other reasons." *Wilson v. Firestone Tire & Rubber Co.,* 932 F.2d 510, 517 (6th Cir. 1991); *Accord Aungst v. Westinghouse Electric Corp.,* 937 F.2d 1216, 1220-21 (7th Cir. 1991).

Applying this analysis to the facts presented in this case, the lower courts found, and Petitioner apparently concedes, that EDS proffered a legitimate non-discriminatory reason for Petitioner's termination. The lower courts also concluded that Petitioner had not come forward with sufficient evidence that EDS' decision was merely a pretext for illegal age discrimination to withstand EDS' Motion for Summary Judgment. Thus, it is solely the resolution of that issue Petitioner challenges in this appeal.

In a disingenuous attempt to manufacture a split in the Circuit Courts of Appeal, Petitioner relies on a selectively excerpted quote from the Third Circuit Court of Appeal's decision in *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893, 901 (3rd Cir. 1987), *cert. dismissed*, 483 U.S. 1052 (1987), for the dubious proposition that the issue of pretext may never be resolved on summary judgment because "an analysis of the pretext issue involves determinations of credibility." (*Petition for Writ of Certiorari*, p. 15). Petitioner is simply wrong. Indeed, even the Third Circuit Court of Appeals itself has expressly rejected the very proposition Petitioner asks this Court to adopt.

In *Healy v. New York Life Ins. Co.*, 860 F.2d 1209 (3rd Cir. 1988), *cert. denied*, 490 U.S. 1098 (1989), the Third Circuit upheld summary judgment for the employer in an age discrimination lawsuit resulting from a reduction in force. In holding that the employee had not established pretext, the Court plainly held that *Chipollini* does not preclude the resolution of the issue of pretext on summary judgment:

> We emphasize that, despite the breadth of the language in *Chipollini*, discrimination cases are inherently fact-bound. Certainly *Chipollini* does not

> stand for the proposition that summary judgment is *never* available in discrimination actions. Rather, we understand the teaching of *Chipollini* to be that where plaintiffs proffer evidence of pretext and create a genuine issue of material fact as to the credibility of the employer's 'legitimate' business reasons, summary judgment is foreclosed.

Id. at 1219 (emphasis added). Thus, Petitioner has been betrayed by the very Circuit Court of Appeals she champions in asserting that the Fifth Circuit erred in affirming summary judgment in this case.

Petitioner's reliance on the Eighth Circuit Court of Appeals' decision in *Haglof v. Northwestern Rehabilitation*, 910 F.2d 492 (8th Cir. 1990) is similarly misplaced. First, the Court's decision in that case did not foreclose resolution of the pretext issue on summary judgment. Rather, it merely cautioned the use of summary judgment in discrimination cases. *Id.* at 495. Additionally, because the *Haglof* decision held that pretext may be established only by discrediting the employer's proffered legitimate reasons for the job action, it is doubtful that *Haglof* survives this Court's recent decision in *Hicks*. Finally, the Eighth Circuit has not hesitated to uphold summary judgment in age discrimination cases where the plaintiff had failed to come forward with evidence establishing pretext. *See e.g., Goetz v. Farm Credit Services*, 927 F.2d 398 (8th Cir. 1991).

Indeed, numerous Circuit Courts of Appeals decisions have upheld the resolution of the issue of pretext on summary judgment where, as in this case, the plaintiff failed to provide competent evidence creating a genuine issue for trial. *See Medina-Munoz v. R.J. Reynolds Tobacco Co.*, 896 F.2d 5 (1st Cir. 1990); *Bovers v. Flying Tiger Line, Inc.*, 979 F.2d 291 (2nd Cir. 1992).

Healy, supra; Guinn v. Electronic Data Systems, Case No. 91-1011 (4th Cir. October 15, 1991); *Amburgey v. Corhart Refractories Corp., Inc.,* 936 F.2d 805 (5th Cir. 1991); *McDonald v. Union Camp Corp.,* 898 F.2d 1155 (6th Cir. 1990); *Daugherty v. Taylor Brothers, Inc.,* 970 F.2d 348 (7th Cir. 1992); *Goetz, supra; Steckl v. Motorola Inc.,* 703 F.2d 392 (9th Cir. 1983); *Merrick v. Northern National Gas Co.,* 911 F.2d 426 (10th Cir. 1990); *Elrod v. Sears, Roebuck and Co.,* 939 F.2d 1466 (11th Cir. 1991). Thus, the Fifth Circuit's affirmance of the District Court's opinion in this case hardly poses a conflict among the Circuit Courts of Appeal.

Furthermore, Petitioner's bold proposition is directly contrary to this Court's interpretation of Rule 56 of the Federal Rules of Civil Procedure. In *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986), this Court cogently explained the operation of Rule 56 as follows:

> Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is 'entitled to judgment as a matter of law' because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.

Id. at 322-23; *accord Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242 (1986); *Matsushita Electric Industrial Co. v. Zenith Radio Corp.,* 475 U.S. 574 (1986).

Here, the trial court found, and the Fifth Circuit agreed, that Petitioner did not come forward with sufficient evidence to establish pretext in this case. Yet, Petitioner would have this Court command a jury trial every time a plaintiff simply suggested that the employer's articulated reasons were not credible. Rule 56 would be totally emasculated, however, if mere incantations regarding the employer's credibility would operate as a talisman to defeat an otherwise valid motion. This Court's decisions in *Catrett*, *Anderson*, and *Matsushita* do not sanction that result.

In sum, Petitioner's assertion that the issue of pretext may not properly be resolved on summary judgment is utterly without support in age discrimination case law and is directly contrary to this Court's interpretation of Rule 56. Therefore, Petitioner has not established that the Fifth Circuit erred, and no further review of this case is required.

II. The Court Of Appeals Properly Held That Petitioner Failed To Raise a Genuine Issue As To Whether EDS' Reason For Terminating Her Was Merely A Pretext For Age Discrimination.

Beyond asserting that the pretext issue may not properly be resolved on summary judgment as a general proposition, Petitioner insists that the lower courts incorrectly found that she had not presented sufficient evidence of pretext to warrant a jury trial in this case (*Petition for Writ of Certiorari*, pp. 15-16). Putting aside that simply reviewing the Fifth Circuit's findings regarding pretext in this case hardly presents an important question of federal law requiring this Court's review (*See* Sup. Ct. R. 10.1), Petitioner has fallen well short of demonstrating that the lower courts' decisions were improper in this case.

A. Petitioner may not rely on an argument not presented to the District Court in establishing grounds for review by this Court.

The gravamen of Petitioner's argument that the Court of Appeals erred in this case appears to be her assertion that a genuine issue of pretext may be gleaned from EDS' alleged failure to follow its internal transfer policy in this case (*Petition for Writ of Certiorari*, p. 16). EDS submits that Petitioner is foreclosed from relying on that argument because she did not raise the issue of EDS' internal transfer system to the District Court.

A time-honored, fundamental principle of appellate jurisprudence is that a reviewing court will not consider issues that were not brought before the trial court. The rationale for this well settled rule of law was succinctly explained by this Court in *Hormel v. Helvering*, 312 U.S. 552 (1941):

> Ordinarily an appellate court does not give consideration to issues not raised below. For our procedural scheme contemplates that parties shall come to issue in the trial forum vested with authority to determine questions of fact. This is essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues which the trial tribunal is alone competent to decide; *it is equally essential in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence.*

Id. at 556 (emphasis added).

As the Fifth Circuit properly held, that principle fully applies in this case. In her response to EDS' Motion for Summary Judgment, Petitioner did not contest or otherwise challenge EDS' statement in its Motion that Petitioner was ineligible to formally enter the internal transfer system (*See* R. Vol. I at 74, 221). Indeed, Petitioner's only mention of this fact was a passing reference in the "Background" section of her response and in her supporting Affidavit, where she matter-of-factly acknowledged that "Herbst strongly suggested that she look outside of EDS because she was not allowed to go on the Internal Openings and Placement list." (R. Vol. I at 204, 231 ¶19). These vague references to an apparently uncontested fact failed to put EDS on notice that Petitioner was alleging that Herbst's view of her eligibility to participate in the internal transfer system was indicative of age discrimination. Thus, under established precedent, Petitioner cannot obtain further review based on this evidence.

It also is critical to note that no injustice resulted from the Fifth Circuit's refusal to consider Petitioner's new argument. In her *Petition*, Petitioner fails to

acknowledge that this very issue was subject to a stipulation by the parties during pretrial proceedings before the District Court. Specifically, Joint Exhibit 3 of the parties' Joint Trial Exhibits (the admissibility of which Petitioner stipulated) submitted to the District Court on July 28, 1992, clearly shows that although Petitioner entered the EDS internal transfers system in early February, 1989, she remained in that system until May 8, 1989. Therefore, as Petitioner's new argument is based upon an entirely false premise, it would be manifestly unjust to permit her to raise it to secure this Court's review.

Finally, even if Petitioner's new argument was considered, it would not create a genuine issue of pretext. It is well established that "erroneous or even arbitrary" business decisions do not create a genuine issue of pretext absent evidence indicating that such decisions were tainted by discriminatory animus. *See e.g., Lawrence v. Chevron, USA, Inc.*, 885 F.2d 280, 285 (5th Cir. 1989); *McDonald v. Union Camp Corp.*, 898 F.2d 1155, 1162 (6th Cir. 1990). Here, there is no evidence to suggest that anyone in EDS' Internal Transfer Department harbored any unlawful animus toward Petitioner or that Herbst, an age contemporary of Petitioner, was motivated by Petitioner's age in concluding that she was not eligible to participate in the internal transfer system. Thus, Herbst's decision, even if based on an erroneous understanding as to Petitioner's internal transfer eligibility, does not evidence illegal age discrimination.

B. Petitioner has not otherwise established that the Court of Appeals erred.

Beyond her reliance on an issue not presented to the District Court, Petitioner asserts, in conclusory fashion, that other evidence establishes her right to a jury trial on the issue of pretext (*See Petition for Writ of Certiorari*, p. 16). However, the evidence cited by Petitioner is insufficient as a matter of law to overcome EDS' summary judgment motion.

A common thread that weaves throughout Petitioner's argument is her own subjective belief that she has fallen victim to age discrimination. It is well settled, however, that Petitioner's mere subjective belief is insufficient to rebut EDS' legitimate business reasons for terminating her employment. *See e.g., Little v. Republic Refining Co.*, 924 F.2d 93, 96 (5th Cir. 1991); *McDonald v. Union Camp Corp.*, 898 F.2d 1157, 1162 (6th Cir. 1990). Accordingly, Petitioner's mere conjecture that EDS accorded younger employees preferential treatment does not establish a material issue of fact as a matter of law. *Slaughter v. Allstate Ins. Co.*, 803 F.2d 857, 860 (5th Cir. 1986).

Likewise, Petitioner's reliance on her purported history of good performance also is insufficient to overcome EDS' motion. Courts have long recognized that employers are entitled to considerable deference in exercising business judgment. On that score, even poorly reasoned business decisions will not demonstrate a genuine issue of pretext without evidence that the decisions were unlawfully motivated. *See Billups v. Methodist Hospital of Chicago*, 922 F.2d 1300, 1304 (7th Cir. 1991); *Lawrence v. Chevron, USA, Inc.*, 885 F.2d

280, 285 (5th Cir. 1989).[8] Therefore, Petitioner's assertion that her performance was satisfactory is not sufficient to warrant full review of this case.

Further review also is not warranted based on the mere fact that Petitioner's Assistant I.E. position was eliminated while two other Assistant I.E.'s continued to be employed by EDS. Again, uncontroverted facts establish that the formal transition from production-type to implementation-type work and the attendant decrease in the need for the preparation of formal, final reports (a principal duty of the Assistant I.E. position) affected only the Insurance Team (*See* R. Vol. I at 104-05, 112-13, 118-19). The work of the Corporate and Finance Teams did not undergo a similar change. Consequently, they continued to need the services of their Assistant I.E.'s, Rosalynn Ford and Penny Welch (both of whom had more EDS seniority and higher performance ratings than Petitioner), as they had in previous years. Thus, as the record indicates that the Corporate and Finance Assistant I.E.'s were not similarly situated to Petitioner, EDS' retention of them following the reorganization of the Insurance Team does not establish pretext. *See Sherrod v. Sears, Roebuck & Co.*, 785 F.2d 1312 (5th Cir. 1986); *see also Mitchell v. Toledo Hospital*, 964 F.2d 577, 583 (6th Cir. 1992) (similarly situated employees must be similar in all respects).

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[8] It is important to note, however, that EDS hardly concedes that Petitioner's work performance was exemplary or that its decision to select her for layoff was a poor business decision. On the contrary, it is undisputed that the other Assistant I.E.'s (Welch and Ford) had more seniority and experience in that position than Petitioner. Moreover, at the time Herbst made the decision to terminate Petitioner, both Welch and Ford had performance ratings of "solid exceeds," two levels higher than Robb's "solid generally meets" rating (R. Vol. I at 112, 116, 118, 122; Vol. III at 149).

Finally, even if there could be any lingering doubt that Petitioner has fallen short of establishing a material question of fact on the issue of pretext, this Court's recent decision in *St. Mary's Honor Center v. Hicks*, _____ U.S. _____, 61 USLW 4782, 62 FEP Cases (BNA) 96 (June 25, 1993) is fatal to Petitioner's claim in this case. In *Hicks*, this Court clarified that the plaintiff must do more than merely establish that the employer's proffered reasons were unworthy of credence. Rather, the employee must show that the reason for the employer's action was illegal discrimination. *Id.* 62 FEP at 104. ("[I]t is not enough . . . to *disbelieve* the employer; the fact finder must *believe* the plaintiff's exploration of intentional discrimination").

While Petitioner has mentioned several grounds which she believes suggest that EDS' proffered reasons were untrue, she has not presented any evidence which even remotely links that decision to her age. Indeed, it is uncontested that Petitioner has never claimed that age-related remarks were ever made by EDS personnel (R. Vol. II at 369) and the record is devoid of any other evidence which would suggest age discrimination. Thus, Petitioner has not satisfied her burden under *Hicks* as a matter of law.

In sum, Petitioner has not established that the lower courts erred in granting EDS summary judgment in this case. Accordingly, no further review is required.

CONCLUSION

The Petitioner has set forth no reasons justifying further review of this matter. Petitioner's arguments have no basis in applicable law and fail to establish that the Fifth Circuit Court of Appeals incorrectly upheld summary judgment in this case. Accordingly, and for all of the foregoing reasons, EDS respectfully requests that the *Petition for Writ of Certiorari* be denied.

Respectfully submitted,

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APPENDIX

Guinn v. Electronic Data Systems, Case No. 91-1011 (4th Cir. October 15, 1991)

[1] No. 91-1011

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CAROL GUINN,
Plaintiff-Appellant,

v.

ELECTRONIC DATA SYSTEMS, INCORPORATED,
Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of West Virginia,
at Parkersburg. Charles H. Haden, II,
Chief District Judge.
(CA-90-178-A)

Argued: June 6, 1991

Decided: October 15, 1991

Before RUSSELL and SPROUSE, Circuit Judges, and
MERHIGE, Senior United States District Judge
for the Eastern District of Virginia,
sitting by designation.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Leman Walton Auvil, PYLES & AUVIL, Parkersburg, West Virginia, for Appellant. Lee J. Hutton, DUVIN, CAHN & BARNARD, Cleveland, Ohio, for Appellee. ON BRIEF: Charles A. Linn, DUVIN, CAHN & BARNARD, Cleveland, Ohio; Robert W. Friend, Sr., Parkersburg, West Virginia, for Appellee.

[2] Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6

OPINION

PER CURIAM:

Carol Guinn appeals from a summary judgment granted to Electronic Data Systems, Inc. (EDS) in her action brought pursuant to the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §621 *et seq.* and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.* Guinn claims that EDS unlawfully discharged her because she was 59 years old and female. We affirm.

Guinn was employed by EDS and its predecessors for twenty-three years in Belpre, Ohio. EDS performs data processing services, such as processing checks for banks, on a nationwide basis. In her complaint, Guinn described herself as an executive secretary/bookkeeper and indicated that she performed a variety of tasks, primarily as a general assistant to the account manager of the Ohio Valley operation. Beginning in 1985, Guinn's responsibilities were diminished as her duties were reassigned to others or absorbed by the corporate headquarters of the companies that acquired the Ohio Valley operation.

Deposition evidence indicates that soon after acquiring the Ohio Valley operation, EDS determined that its operations were unprofitable. Because the division was losing between one and two million dollars a year, EDS instituted procedures to reduce expenses. The regional accounts manager instructed Guinn's local superior to reduce the size of its work force by ten percent and to suggest positions for elimination. This required the termination of four employees from the staff of approximately forty. Consultation among the Ohio Valley operations supervisors failed to identify all four positions to be eliminated and, as a consequence, the regional account executive selected four individuals for termination. Guinn, who was 59 years of age at the time, was one of the four. Subsequently, Guinn filed suit in the United States District Court for the Southern District of West Virginia, alleging that EDS violated her rights under ADEA and Title VII of the Civil Rights Act of 1964.

[3] Ultimately, Guinn must prove that "but for" her age or sex EDS would not have discharged her. Plaintiffs can accomplish this through traditional methods of proof, that is, by relevant and probative direct or indirect evidence of discrimination. *Goldberg v. B. Green & Co.*, 836 F.2d 845, 847 (4th Cir. 1988); *Lovelace v. Sherwin-Williams Co.*, 681 F.2d 230, 239 (4th Cir. 1982). We also permit ADEA plaintiffs to use the three-stage scheme of proof devised by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981). *See Herold v. Hajoca Corp.*, 864 F.2d 317, 319 (4th Cir. 1988), *cert. denied*, 490 U.S. 1107 (1989); *E.E.O.C. v. Western Electric Co.*, 713 F.2d 1011, 1014-15 (4th Cir. 1983); *McDaniel v. Mead Corp.*, 622 F.Supp. 351 (W.D. Va. 1985) *aff'd*, 818 F.2d 861 (4th Cir. 1987).

Under the *McDonnell-Douglas* scheme, as adapted by *Burdine,* the plaintiff establishes a prima facie case of discrimination by satisfying a four-prong test. The prima facie case establishes a rebuttable presumption of unlawful discrimination and shifts the burden of producing evidence to the employer. At this stage, the employer must articulate some legitimate non-discriminatory reason for its action. At the final stage, the employee bears the burden of demonstrating that those reasons are untrue or a pretext for discrimination. *Burdine,* 450 U.S. at 254-55; *Herold,* 864 F.2d at 319; *Western Electric,* 713 F.2d at 1014.

We agree with the district court that even had Guinn established a prima facie case, she failed to present sufficient evidence to create an inference that EDS' legitimate non-discriminatory reason for the action was a pretext for discrimination.

EDS met its obligation to produce evidence of a legitimate non-discriminatory reason for its action. EDS states that it terminated Guinn and three other employees in an effort to reduce expenses by reducing its work force. EDS based its choice of which employees to terminate on an age and sex neutral standard: it would discharge those employees whose departure would have a minimal impact on its ability to provide services to its customers.

Guinn attempts to rebut this by pointing to the fact that all four discharged employees were over the age of 45. We agree with the dis-[4]trict court's conclusion that this fact, standing alone, does not establish a genuine issue for trial. Guinn also argues that EDS failed to transfer her to the position of "fine sorter" at Belpre, but that EDS later transferred two 35 year old male employees to that position from another facility. She

does not, however, offer any evidence to counter EDS' explanation that the position was simply not vacant at the time she was terminated.

In addition, Guinn provides no evidence to indicate that she was discharged because she is a woman. We agree with the district court that her failure to support this claim means there is no triable issue of sex discrimination.

Under Fed. R. Civ. P. 56, summary judgment is granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. The moving party, EDS, bears the initial burden of showing the absence of a genuine issue concerning any material fact. *Adikes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). Once that burden is met, the nonmoving party, Guinn, must "establish the existence of an element essential to that party's case, and one which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Summary judgment is appropriate in age and sex discrimination cases when the plaintiff does not produce sufficient evidence to create an inference of discriminatory motive to rebut the employer's articulated non-discriminatory reason. *McDaniel*, 622 F. Supp. at 361.

We agree with the district court that the summary judgment record reflects that over the final two years of her employment Guinn's duties had diminished until her time was not fully occupied and her dismissal would have little or no impact on the delivery of customer services and that her termination was based on legitimate non-discriminatory business reasons rather than on either age or sex considerations.

In view of this, the opinion of the district court is affirmed.

AFFIRMED